

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-6152

In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-6152

UNITED STATES OF AMERICA

Plaintiff-Appellant,

v.

VARIOUS ARTICLES OF OBSCENE MERCHANDISE
SCHEDULE NO. 1303,

Defendant-Appellee.

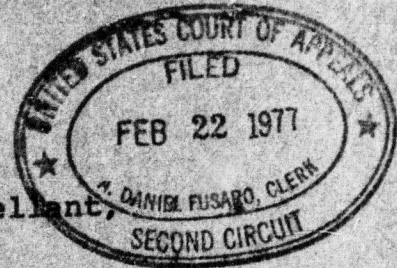
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR CLAIMANT-APPELLEE

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Friedman, United States Commission on Obscenity and Pornography, Technical Report, Vol. 5	22
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Monaghan, <u>First Amendment "Due Process,"</u> 83 Harv.L.Rev. 518 (1970)	29
<u>Moore's Federal Practice</u> , p. 612, para. 60[6]	43
Redish and Woods, <u>Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis</u> , 124 U.Pa.L.Rev. 45 (Nov. 1976)	39, 40
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STATEMENT OF THE CASE

The claimant, Bruce Long, accepts the Statement of the Case and Facts set forth in the Plaintiff-Appellant's Brief, as supplemented by the following.

The Lancaster community standards.

In June, 1973, the United States Supreme Court held in Miller v. California, 413 U.S. 15, that obscenity may be determined by reference to local community standards. In September, 1973, in response to the Miller decision, the Mayor of Lancaster, Pennsylvania set up a commission of local citizens to formulate an acceptable set of community standards; the claimant, Mr. Long, was a member of that commission. The commission issued its report on December 18, 1973 (A. 189-90).*

The commission concluded that, in Lancaster, no governmental restriction of allegedly obscene materials was justified except to protect children and to prevent obscene materials being thrust on unwilling members of the public (A. 148-52, 189-90). Since that report, adults in Lancaster have had unimpaired access to allegedly obscene materials, and numerous "adult" bookstores sell materials that are similar to the article Mr. Long claims here (A. 149).

* "A. ____" refers to the Appendix filed herein by the government. The record does not contain the actual text of the Mayor's Commission report, but the District Court admitted, without objection, a contemporaneous news article describing the report (A. 148-53).

Section 1305 forfeiture proceedings.

This appeal involves the forfeiture proceedings against one article listed on Schedule No. 1303 in the Southern District of New York; 573 other seizures were listed on that schedule (A. 7-64). The addressees for those seized articles reside all over the United States. (The geographical distribution is shown on the map which we are including as an addendum hereto.) Only 14 persons returned the forms to contest the proceedings in the Southern District. Of those, only one, Mr. Long, appeared for the scheduled hearing.*

* The materials addressed to the 559 addressees who did not return a claim and answer were ordered forfeited and destroyed by partial default judgment (A. 111-13). As District Judge Frankel indicated, that is the normal practice followed with respect to the vast majority of such seized matter which is ". . . consigned by default to be destroyed " (A. 164). As to all such materials, there is never a judicial finding of obscenity, only the administrative action which resulted in the seizure.

As to the 13 claimants besides Mr. Long who did file an objection, none of them lived in the Southern District of New York (A. 107-10). In almost every case, the contents of the seizure consisted of "illustrated advertising" or a single copy of a magazine. The single exception was a gynecologist in California who was the recipient of 19 magazines, all of which were released to him by the United States Attorney's office following his representation that he intended to look at the magazines "to see if they would be useful in counseling patients with sexual problems" (A. 95). All of these 14 claimants were given one week's notice of the trial (A. 107-08), and the articles addressed to the other 12 individuals, none of whom appeared, were found obscene by the District Court in an uncontested proceeding and ordered condemned (A. 126-27).

Mr. Long's appearance for the hearing was highly unusual. Judge Frankel noted that, in his ten years on the bench, Long was only the third claimant to appear for the hearing (A. 164).

That observation is supported by the records of other Section 1305 proceedings in the Southern District of New York. The following data was gleaned from a random sampling of ten (10) such proceedings during 1975 and 1976.* In the ten proceedings, 1711 seizures were listed, an average of 170 per week. The addressees resided all over the country. Only 100 persons filed claims and answers, an average of 10 per week, representing approximately 6% of the total seizures. Of the 1711 seizures, not one person appeared for the hearing scheduled in the Southern District!

The result: 100% of the forfeitures in those ten cases were made without an adversary hearing, and about 94% of all administrative seizures resulted in forfeitures without any judicial review.

* The docket numbers of the proceedings sampled were as follows:

75 Civil 630 (Schedule No. 1194)
75 Civil 818 (Schedule No. 1199)
75 Civil 2342 (Schedule No. 1245)
75 Civil 2864 (Schedule No. 1260)
76 Civil 437 (Schedule No. 1345)
76 Civil 1645 (Schedule No. 1357)
76 Civil 2239 (Schedule No. 1385)
76 Civil 2363 (Schedule No. 1386)
76 Civil 2540 (Schedule No. 1397)
76 Civil 4675 (Schedule No. 1456)

ARGUMENT

"He has called together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records, for the sole Purpose of fatiguing them into Compliance with his Measures."

- Declaration of Independence

Introduction

The grievance which the Founding Fathers had with King George III is not dissimilar from the gravaman of what the District Court found defective in the method of enforcement of Section 1305. As the record so vividly reflects, the enforcement of the statutory prohibition on the importation of obscene material is essentially a system of enforcement by default. Each year it results in thousands of people having their rights under the First Amendment unilaterally determined by bureaucratic officials because it is simply too burdensome for those persons to challenge the administrative determination by journeying to the Southern District of New York, examining the allegedly obscene material, obtaining counsel, and defending their right to receive the material. Moreover, the system is also constitutionally suspect because it determines the obscenity vel non of the material by the standards of the Southern District of New York, even though the material may have fortuitously been received in this District and even though, as here, the addressee may reside in a community by whose standards the material would be readily available and deemed protected under

the Constitution.

Analyzing both elements of the customs enforcement procedures, Judge Frankel found them to be unconstitutional under the First Amendment in two respects:

"(a) in depriving claimants and their local communities of the freedom to read and see things in accordance with their own standards of what is or is not obscene, and (b) failing to afford a less onerous and expensive procedure for the vindication of First Amendment claims to items seized" (A. 175-76).

And the remedies required by the ruling below are modest, indeed: first, that the obscenity of material seized in the Southern District of New York be determined by reference to the standards of the community in which they will be read, and second, that the claimant is entitled to have those proceedings held in that district.

We suspect that, if the District Court ruling is affirmed, the vast majority of allegedly obscene materials seized by customs will still be forfeited and condemned by default, and very few claimants will in fact exercise the rights which Judge Frankel held must be afforded them under the Constitution. The important thing, however, is that such rights be available to those, like Mr. Long, who wish to exercise them. For the following reasons, the District Court's decision that such rights were required was
eminently sound.*

* In the District Court, the claimant raised, but the District

I.

THE DISTRICT COURT PROPERLY HELD THAT THE APPLICABLE COMMUNITY STANDARDS FOR DETERMINING THE OBSCENITY OF AN ARTICLE SEIZED UNDER 19 U.S.C. §1305 ARE THOSE OF THE COMMUNITY TO WHICH IT IS ADDRESSED AND THAT THE DETERMINATION SHOULD, AT THE CLAIMANT'S REQUEST, BE MADE IN THAT COMMUNITY.

A. The appropriate community standards.

The district court held that the proper community standards for determining the obscenity of an article seized under Section 1305 are those of the community to which it is addressed, rather than those of the district in which it is seized. The claimant contends that this is both the sensible and the constitutionally required construction of Section 1305.

1. The "community standards" test.

Although the First Amendment guarantees free speech and press, the Supreme Court has held that obscenity is not protected expression. Roth v. United States, 354 U.S. 476 (1957). The line between protected expression and obscenity, however, is often difficult to draw, and the determination of obscenity vel non is therefore a

Footnote Cont'd

Court did not resolve the question of the validity, under the Fourth Amendment, of the methods by which customs agents open letter mail from abroad, that is, without a search warrant or probable cause (A. 165-66). Similar issues are now pending before the United States Supreme Court in United States v. Ramsey, O.T. 1976, No. 76-167.

question of constitutional law.

In Miller v. California, 413 U.S. 15, 24 (1973), the Supreme Court set forth the test for determining obscenity:

The basic guidelines for the trier of fact must be:
 (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

In making "community standards" a substantive element of the legal definition of "obscenity," the Court made the question of what community's standards to apply one of constitutional dimension.

Most of the cases on what community's standards to apply have focused on the size of the community. In Manual Enterprises v. Day, 370 U.S. 478, 488 (1962), and Jacobellis v. Ohio, 378 U.S. 184, 193 (1964), the plurality opinions endorsed a national standard. In 1973, the Court rejected a national standard as "hypothetical" and "unascertainable" and because it "strangled" diversity as to what constitutes obscenity and might result in the suppression of materials which a given community would permit to be distributed. The Court instead upheld use of a state-wide standard. Miller v. California, supra at 31-33. In Jenkins v. Georgia, 418 U.S. 153, 157 (1974), the Court approved a jury instruction which did not specify what "community" to use. Some federal courts have invoked the community standards of the districts in which they sit and from which they draw a jury. United States v. Marks, 520 F.2d

913,919 (6th Cir. 1975), cert. granted, 424 U.S. 942 (1976); United States v. Miscellaneous Pornographic Magazines, 400 F.Supp. 353 (N.D. Ill. 1975). The Supreme Court has expressly held that the local community standards rule applies to federal as well as state obscenity statutes. Hamling v. United States, 418 U.S. 87, 105 (1974); United States v. 12 200-Ft. Reels, 413 U.S. 123, 130 (1973).

There has been little discussion, however, about which community's standards to use when more than one community is involved, as often happens with federal obscenity statutes. When, as here, customs officials, acting under Section 1305, seize allegedly obscene materials at a port of entry, there are usually two communities involved--that of the port of entry and that of the addressee of the materials. The government insists that the appropriate standards are those of the port of entry. But we contend that the appropriate and constitutionally-required standards are those of the community which would be most significantly affected by the allegedly obscene material and in which the addressee resides, namely, the recipient community.

2. Constitutional requirements in selecting the appropriate standard.

The government contends that, under Miller, the community standard to be used under Section 1305 is always that of the port-of-entry community. The government argues that the only purpose of Miller's "community standards" rule is to direct "the fact

finder to look beyond his or her own subjective prejudices and predilections" (Brief at p. 9) in determining obscenity and that using the standards of the port-of-entry community fulfills that need.^{1/}

It is true that one of the purposes of the community standards rule is to require fact finders to rely on external standards rather than personal prejudices. This protective purpose, however, is served by any external standard, based on any size geographical community, including a national one. The Supreme Court has favored reliance on the standards of smaller communities for a significantly different reason--to permit and encourage diversity within the nation.

Since Roth, the Supreme Court has frequently had occasion to discuss whether "national" or "local" community standards should be applied. One of the principal concerns in these cases has been to identify the standard that would best protect and encourage diversity of tastes among the nation's many communities. See Manual Enterprises, Inc. v. Day, supra (local standards would have "the intolerable consequence of denying some sections of the

^{1/} The government's reliance, Brief at p. 11, on United States v. Cutting, 538 F.2d 835 (9th Cir. 1976), cert. denied, 45 U.S.L.W. 3456 (1/11/77) is inappropriate here. The issue there was whether the district court's instruction to a jury to apply a national standard of obscenity required reversal of a conviction. Thus the case involved a conflict between a national and a local standard, not, as here, a conflict between two different local standards.

country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." 370 U.S. at 488); Jacobellis v. Ohio, supra ("to sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene" 378 U.S. at 194).

The local standard ultimately prevailed in Miller v. California, supra, at least partly because the Court concluded that a local standard most effectively permits and encourages diversity:

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.^{13/} . . . People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. . . .

^{13/} . . . The use of "national" standards . . . necessarily implies that materials found tolerable in some places, but not under the "national" criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes 413 U.S. at 32-33.

See also Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973);

Hamling v. United States, 418 U.S. 87, 106-107 (1974).^{2/}

^{2/} In Paris Adult Theatre I, the Court said that states are free to "follow . . . a 'laissez-faire' policy and drop all controls on commercialized obscenity, if that is what they prefer" Id. at 64.

In Hamling, the Court quoted with approval Chief Justice

The Miller Court, however, set up national baseline requirements. Thus, no materials can be declared obscene, and therefore unprotected expression, unless they lack "serious literary, artistic, political, or scientific value," supra at 24, and unless they are "hard core" pornography, supra at 25-27. If, and only if, those national baseline requirements are met, the materials may be declared obscene under local community standards. Thus, free expression is assured to a great extent, with local communities free to allow even greater latitude for expression.

Thus, a central purpose of the local community standards rule is to assure that a community that is tolerant toward "obscenity" is not denied materials because some other communities are less tolerant. Miller, supra at 32 n. 13. But if, as the government argues here, the standards used in a Section 1305 forfeiture proceeding are those of the district of seizure, a few

Footnote 2 Cont'd

Warren's statement in Jacobellis v. Ohio, supra at 200-01 (dissenting opinion): "[C]ommunities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals." Id. at 107.

These views echoed Justice Harlan's compelling remarks in favor of local standards in his dissenting opinion in Roth v. United States, supra at 505-06. Justice Harlan favored local standards precisely because they permitted "the States to differ on their ideas of morality." He objected to the federal government being able to impose a "blanket ban over the Nation" on allegedly obscene materials.

happenstantial ports of entry would become the arbiters of taste and decency for recipients of mail everywhere. That result is comparable to having a discredited national standard which stifles diversity. A construction of Section 1305 which permits that result is neither sensible, fair, nor constitutional.

Moreover, such a result is particularly unwarranted given the rather attenuated federal purposes served by the prohibition on the importation of obscene materials. The continued validity of controls on obscene materials has been upheld essentially on grounds which relate to the state's police power to insure the general welfare of the community. See Paris Adult Theatre I v. Slaton, supra, 413 U.S. at 63-69.

Federal controls have been upheld primarily in order to facilitate the enforcement of the interests advanced by state and local controls. See United States v. Orito, 413 U.S. 139, 143-44 (1973). But where a community does not want such protection, the rationale for federal intervention becomes diminished. Assume, for example, that one-half the states, not including New York, determined to "de-criminalize" the sale to consenting adults of otherwise obscene material. (Apparently, at least eight states have done so.) In that event, the imposition of the more restrictive standards of this district would serve no valid purpose whatsoever except to restrict the scope of permissible expression of claimants residing in those various states. The approach to community standards

taken in Miller v. California was designed precisely to prevent that from happening.

The facts here illustrate the danger of having ports of entry dictate acceptable expression. As District Judge Frankel found, there is "substantial (and uncontradicted) evidence that the community standard defining obscenity in Lancaster is far more stringent, i.e., libertarian, than that in New York. Under Lancaster's standards, it seems that nothing is to be outlawed as obscene that is (1) viewed by an adult in private and (2) not offered or purveyed to children" (A. 168). Despite that tolerant view, the claimant, a resident of Lancaster, is threatened with forfeiture of his presumably protected material under the less tolerant standards of New York. If Lancaster happened to be an international port of entry, the claimant probably could import the seized merchandise without hindrance. First Amendment rights should not be made to turn on such happenstance.

3. Non-constitutional approach to selecting the appropriate community standard.

What the First Amendment compels, common sense also requires. Even without the Supreme Court's guidance on the issues, the sensible construction of Section 1305 is to utilize the standards of the recipient community to judge the obscenity of the material in question.

Modern conflicts-of-law doctrines reinforce this approach to

the enforcement of Section 1305.

Under one such doctrine, the controlling law is taken from the jurisdiction which has the most significant contacts with the allegedly wrongful act. Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Schauer, Obscenity and Conflicts of Laws, 77 W. Va. L.R. 377, 397 (1975). By analogy, in a Section 1305 forfeiture proceeding, the standards used to determine obscenity should be those of the community which has the most significant contacts with the allegedly obscene materials sought to be imported. That community would certainly be the recipient community. Schauer, supra at 398. Here, for example, almost all of the materials listed on Schedule 1303 were en route from overseas to people outside the Southern District of New York. New York's and this District's only connection with the materials was a result of mail routes. New York will not be affected by whether these materials are declared obscene or not. Lancaster, Pennsylvania, on the other hand, will be affected if materials that it deems non-obscene are excluded or if materials that it deems obscene are allowed to enter. And it should be emphasized that the Lancaster community, as well as the claimant himself, has an interest in having its liberal approach to obscenity respected, since that community has intentionally determined to allow its citizens considerable freedom in selecting their sexually-oriented literature. Such considerations were implicit in United States v. Elkins, 396 F.Supp. 314 (C.D. Cal. 1975), where the court ruled that, in a prosecution

under 18 U.S.C. § 1461, the appropriate standards for determining obscenity should be those of the "area of distribution of the material" Id. at 316.

Under the other modern conflicts doctrine, the purpose of the statute is a central factor in determining which law to apply. Schauer, supra at 398. Presumably, the purpose of Section 1305 is to protect the public from imported obscene materials. But which public? The interests of the residents of the Southern District of New York are not directly implicated by a determination that the material can be imported by Mr. Long in Lancaster, Pennsylvania. The only conceivable statutory purpose that would relate to interests here and which would justify utilizing the standards of the port-of-entry community would be an intention to protect the mails or customs channels from "contamination." If we were dealing with contaminated fruit, such a purpose might be implicated. But surely advancing such a purpose is totally irrelevant where allegedly obscene magazines are concerned. The purpose of the statute is effectuated when the standard for obscenity is that of the community where the materials may come in contact with the group that the statute was presumably designed to protect, namely, the recipient community. Only by reference to that community's standards can it be determined whether that "public" needs further protecting from the imported materials.

Furthermore, using the standards of the recipient community

is fairer because it gives an importer of arguably obscene material more notice and predictability of what standards will be used. An importer probably will know the standards of his community, and he can order merchandise accordingly. If, however, the standards of the port of entry are used, the predictability is gone. An importer has no control over, or even knowledge of, the route his mail will take. It could be inspected and seized at any one of numerous ports of entry, each of which may have different standards on obscenity. This uncertainty inevitably has a "chilling effect" on the importer's choice of what he will order and therefore on what he can read and see. Such a "chilling effect" on free expression warrants special scrutiny by the courts. NAACP v. Button, 371 U.S. 415 (1963); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

B. The appropriate fact finder.

Under Section 1305, the fact finder^{3/} at the port of entry conceivably could try to apply the standards of the recipient community, with the claimant attempting to introduce evidence on the standards of his home community. That, however, as Judge Frankel found, would be "at best a dubious enterprise" (A. 172) because the procedure is both impractical and contrary to the language and holdings of several cases.

^{3/} Under Section 1305, the claimant has the right to demand a jury.

A basic premise of the community standards rule is that, "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination" Hamling v. United States, supra, 418 U.S. at 104 (emphasis added).^{4/} In United States v. Elkins, supra, the Central District of California, after assessing Hamling and other cases on community standards, dismissed an indictment rather than attempt to apply the local community standards of another community (the Northern District of Iowa), concluding that jurors must apply the standards of their own community, not those of some other community. The court said that a California jury could not apply Iowa standards even if the parties introduced expert testimony on Iowa's standards. And in United States v. McManus, 535 F.2d 460, 464 (8th Cir. 1976), cert. denied, 45 U.S.L.W. 3456 (1/11/77), a sequel to Elkins, the court held that only an Iowa court could apply Iowa standards. Under these cases, the appropriate fact finder in a Section 1305 forfeiture proceeding is the district court for the claimant's home community.

Furthermore, expecting a jury to apply the standards of some alien community is unrealistic. First, as District Judge Frankel

4/ The Hamling Court mentioned that a district court might be allowed to admit evidence of standards existing outside the district if it felt the evidence would help the jury. Id. at 106. That comment, however, was in the context of a discussion about the size of the appropriate community and referred to evidence of standards in the larger community of which the district is part, not the standards of a wholly unrelated community.

pointed out, trying to base a determination of obscenity on an "abstract formulation" of the standards of an alien community is as futile as trying to base the determination on a "national" standard (A. 172-73). As the Court said in Miller v. California, supra, "[I]t would be unrealistic to require that the answer [on obscenity vel non] be based on some abstract formulation To require a state to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility." 413 U.S. at 30. Second, even if evidence of the standards of an alien community were adduced, the jurors probably would apply the standards of the community with which they are most familiar rather than those of the alien community; jurors will not readily displace "uniquely felt local attitudes" (A. 173). Instructions to a jury cannot always alter their previous impressions. See Bruton v. United States, 391 U.S. 123, 129 (1968); Schauer, supra at 395. This would be especially true when, as here, the alien community is significantly more tolerant of obscenity than the forum community.

Requiring a claimant in Section 1305 proceedings to prove the standards of the recipient community also presents serious practical problems. The claimant probably would have to bring witnesses from the recipient community, which may be on the other side of the country from the port of entry. Not all claimants will be in the fortunate situation of Mr. Long, whose community had specifically addressed itself to such matters and issued a report on the subject.

All of these problems can be avoided by allowing the claimant to have the forfeiture proceeding transferred to the federal district court of the recipient community. Then the fact finder could apply the standards of its own community, that of the forum; there would be less danger of jurors ignoring evidence or instructions; and the claimant could more readily introduce evidence on the appropriate standards. 5/

II.

THE DISTRICT COURT PROPERLY DECLARED
UNCONSTITUTIONAL THE ONEROUS AND
BURDENSOME PROCEDURES WHICH REQUIRE
A SECTION 1305 CLAIMANT TO JOURNEY
TO THE PORT OF ENTRY TO SEEK TO VIN-
DICATE HIS FIRST AMENDMENT RIGHTS.

The procedural regime for the enforcement of Section 1305, as reflected in the record of this case, is essentially a system of defaults. It operates on the silent premise that, in almost every

5/ The government argues that transferring this claimant's forfeiture proceedings to the Eastern District of Pennsylvania, which sits in Philadelphia, would not obviate the problems because some of the fact finders may be as unfamiliar with the community standards of Lancaster as fact finders in the Southern District of New York.

But the judges and jurors in Philadelphia are much more likely to be familiar with Lancaster than judges and jurors in New York. Certainly the judges have frequent contact with Lancaster. Furthermore, over a period of time, as they deal with forfeiture proceedings involving Lancaster standards, they will gain more familiarity. Moreover, Philadelphia is more convenient to Lancaster than New York; in Philadelphia, the claimant can more readily adduce evidence of Lancaster's standards, as by calling witnesses. Finally, in many other instances, the federal district court will be in or very near the particular recipient community.

case, the censor's determination will go unchallenged and hence undisturbed. As District Judge Frankel found, and as we will show, such a procedural regime, by failing to afford less burdensome and onerous procedures for the vindication of First Amendment claims to seized items, is unconstitutional.

The record here demonstrates the way the system functions.

Schedule 1303 contains the names of almost 600 people who had their mail seized by customs officials in New York during the week of September 12-18, 1975. These people live all over the United States, and some as far away as Hawaii and Alaska. (See the Addendum hereto). They were notified that they could contest the forfeiture and destruction of the merchandise by sending a claim and answer to the United States Attorney for the Southern District of New York.

Predictably, few contested. Only 14 filed a claim and answer; the other 98% defaulted. This pattern is repeated in the ten other such cases that we sampled. See supra, p.4. The addressees had no effective opportunity to examine the seized materials to determine whether they wanted to contest the forfeitures. The addressees were not told that the seizure was based on a mere administrative determination of possible obscenity by customs officials, or that, by returning a claim and answer, they could have a federal judge make an independent determination of obscenity

vel non. As a result, the hasty^{6/} administrative determinations of obscenity made by customs officials became, in effect, final decisions on constitutional issues.

The 14 claimants, who live throughout the country (A. 124-125), who did respond herein were notified that a hearing would be held in the Southern District of New York. Only Bruce Long, the claimant here, appeared. Thus, out of almost 600 addressees of mail that is presumably protected by the First Amendment, only one had a hearing. Many of the others were undoubtedly thwarted from defending their First Amendment rights by the unnecessarily onerous requirement that they journey to the port of entry to have a hearing. As District Judge Frankel noted, the materials seized under Section 1305 are "characteristically of trivial monetary value. The burden and expense of coming [to New York City] to press a claim are altogether disproportionate" (A. 174). As a consequence, the right to a hearing was patently illusory.

The effect of this system is to deny to addressees outside the district of seizure the procedural safeguards which are required by the First Amendment.^{7/}

^{6/} Time constraints and quantity of materials leave little time to judge borderline materials. Friedman, United States Commission on Obscenity and Pornography. Technical Report, Vol. 5, p. 15, 29.

^{7/} Although our argument is that the system of Section 1305 enforcement at issue herein deprives addressees of the exceptionally

Footnote 7 Cont'd

strict procedural safeguards required in the First Amendment area, we submit that the existing Section 1305 forfeiture procedures are unconstitutional even under a less rigorous due process analysis which provides greater leeway for accommodating a balancing of interests. As the Supreme Court said in Matthew v. Eldridge, ____ U.S. ____, 96 S. Ct. 893, 903 (1976):

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substituted procedural requirement would entail.

Under all three factors, the procedural system here violates due process. First, under Section 1305, the "private interest" affected by official action is the property interest in the seized materials and the preeminent right of free expression guaranteed by the First Amendment. Free expression is, of course, entitled to great protection from adverse official actions. Procunier v. Martinez, 416 U.S. 396, 411 (1974); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

Second, the risk of "erroneous deprivation" of property and of protected expression under Section 1305 procedures is very high: only about 2% of the administrative determinations of obscenity in Schedule 1303 received any judicial review. The possibility of error could be dramatically reduced by the modified procedures discussed infra, the main element of which is allowing a claimant to request that forfeiture proceedings against his materials be transferred to the district court in which he resides.

Third, the government's interest would not be significantly impaired by the modified procedures. Only those claimants who specifically requested a venue change would get one. And the government, of course, already has a United States Attorney's office in each district; the routine transfer of Section 1305 forfeiture proceedings would entail minimal fiscal or administrative burdens.

A. The unconstitutionality of the existing Section 1305 procedures.

"We risk erosion of First Amendment liberties unless we train our vigilance upon the methods whereby obscenity is condemned no less than the standards whereby it is judged." Manual Enterprises, Inc. v. Day, supra, 370 U.S. at 497. Even though it has upheld the constitutionality of the continued prohibition of obscenity, the Supreme Court has made it clear, in a long line of decisions, that it will insist upon the most careful procedural safeguards to confine the censor's decision. For example, in Blount v. Rizzi, 400 U.S. 410 (1970), involving the exercise of censorship powers by postal officials, the Court stated the following:

Since §4006 on its face, and §4007 as applied, are procedures designed to deny use of the mails to commercial distributors of obscene literature, those procedures violate the First Amendment unless they include built-in safeguards against curtailment of constitutionally protected expression, for Government "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." Marcus v. Search Warrant, 367 U.S. 717, 731 (1961). Rather, the First Amendment requires that procedures be incorporated that "ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line . . . Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards . . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks . . . " Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66, (1963). Since we have recognized that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . [t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . " Speiser v. Randall, 357 U.S. 513, 525, (1958). 400 U.S. at 416-17.

The sensitive tools and stringent scrutiny which are normally necessary where important First Amendment rights are concerned are particularly required where, as here, we deal with a system of prior restraints. Notwithstanding the government's contrary assertion (Brief, at p. 26), Section 1305 embodies such a scheme because any situation where officials may seize materials that arguably fall within First Amendment protection and thereby bring "to an abrupt halt an orderly and presumptively legitimate distribution . . . , is plainly a form of prior restraint" Roaden v. Kentucky, 413 U.S. 496, 504 (1973). See also Marcus v. Search Warrants, 367 U.S. 717, 736 (1961). Furthermore, requiring materials to be approved by customs officials before they can be released to the addressee and allowing government officials to hold seized materials pending a judicial determination of obscenity is comparable to requiring a license or permit before allowing a movie or play to be exhibited. See Freedman v. Maryland, 380 U.S. 51 (1965); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). The customs official's "job of 'screening,' and then admitting or blocking books is forsooth 'censorship' in the literal and, more importantly, in the constitutional sense." United States v. One Book Entitled "The Adventures of Father Silas," 249 F.Supp. 911, 919, n. 14 (S.D.N.Y. 1966).

And, of course, any system of prior restraints, such as Section 1305 forfeiture proceedings, bears "a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S.

58, 70 (1963); Freedman v. Maryland, supra at 57. "The presumption against prior restraints is heavier - and the degree of protection broader - than that against limits on expression imposed by criminal penalties." Southeastern Promotions, Ltd. v. Conrad, supra at 558-59. Prior restraints from "licensing" have always been subject to extreme scrutiny. See, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969).

Accordingly, "[t]he settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" Southeastern Promotions, Ltd. v. Conrad, supra at 559. The procedures under Section 1305, rather than obviating the dangers of a censorship system, encourage them.^{8/} Those procedures reflect a callous indifference to First Amendment rights and are much more burdensome than necessary to achieve any legitimate governmental objectives involved here. As the Supreme Court said in Shelton v. Tucker, supra at 488:

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle

^{8/} The issue of the unreasonably burdensome procedures under Section 1305 has been presented in two cases, but was not reached in either. United States v. Articles of "Obscene" Merchandise, 315 F.Supp. 191, 193 (S.D.N.Y.) (three-judge court), appeal dismissed, 400 U.S. 935 (1970), 403 U.S. 942 (1971); United States v. One Book Entitled "The Adventures of Father Silas", 249 F.Supp. 911, 913 n.3 (S.D.N.Y. 1966).

fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in light of less drastic means of achieving the same basic purpose.

Since Shelton, the Court has repeatedly emphasized that the means the government uses to accomplish legitimate ends may not be "unduly onerous" to First Amendment rights. Freedman v. Maryland, supra at 58.

In Procunier v. Martinez, 416 U.S. 396, 413-14 (1974), the Court held:

[c]ensorship of prisoner mail is justified if the following criteria are met. . . . [T]he limitation of First Amendment freedoms must be no greater than necessary or essential to the protection of the particular governmental interest involved. Thus a restriction . . . that furthers an important or substantial interest . . . will nevertheless be invalid if its sweep is unnecessarily broad. (emphasis added)

In Lamont v. Postmaster General, 381 U.S. 301 (1965), the Court declared unconstitutional a provision of the postal laws that required a person receiving "communist propaganda" from abroad to return a reply card saying he wanted it, because requiring the addressee to return the card was an unlawful limitation on his First Amendment rights.

In Freedman v. Maryland, supra, the Court held that, although the state had the power to require advance screening of movies for obscenity, its procedures were too burdensome, and there were inadequate procedural safeguards to minimize the impact of its regulation on protected expression.

Similarly, in Blount v. Rizzi, supra, the Court declared

unconstitutional provisions of the postal laws that allowed postal officials to halt delivery of allegedly obscene mail, because the procedure placed the burden of obtaining judicial review on the addressee.

Finally, in a case involving Section 1305, the Supreme Court held that the government had to institute and complete its forfeiture proceedings within strict time limitations. All members of the Court agreed that, without such procedural safeguards, the procedures under the statute would be an unconstitutional burden on protected expression. United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971). In reaching that result, the Court pointed out that, in the debates on adoption of the current version of Section 1305, various Senators " . . . indicated their aversion to censorship 'by customs clerks and bureaucratic officials,' . . . preferring instead that determinations of obscenity should be left to courts and juries." 402 U.S. at 370-71. Unfortunately "censorship by clerks" is exactly what has resulted.

B. The burdens imposed by the present procedures and the less intrusive alternatives available.

The foregoing cases establish that, even in pursuit of an objective that is legitimate and substantial, government action which arguably infringes on free expression must be no greater than is essential to the furtherance of that objective. When "less drastic means" will achieve the objective, they must be used.

See, e.g., Procunier v. Martinez, supra at 411.

The most important procedural safeguard in any system of prior restraints is assurance of a prompt, independent, judicial determination. Freedman v. Maryland, supra at 58; Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518, 520 (1970). Under Section 1305, a judicial determination of obscenity vel non is especially important to assure that free expression is not improperly restricted by customs officials: "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court--part of an independent branch of government--to the constitutionally protected interests in free expression." Freedman v. Maryland, supra at 57-58.^{9/}

Section 1305 procedures theoretically provide for such a determination; practically, however, this essential safeguard is illusory, because, as the facts here prove, few people are able to utilize that burdensome procedure. The record here demonstrates precisely what the Supreme Court has observed: " . . . if judicial review is made unduly onerous, by reason of delay or otherwise, the

^{9/} As Professor Monaghan has observed: " . . . [T]he role of the administrator is not that of the impartial adjudicator but that of the expert--a role which necessarily gives an administrative agency a narrow and restricted viewpoint. This is particularly pernicious in the obscenity area; those constantly exposed to the perverse and the aberrational in literature are quick to find obscenity in all they see." Monaghan, supra at 523. See also Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob. 648, 658 & n.34; J. Milton, Areopagitica 20-21 (Everyman ed. 1927).

[censor's] determination in practice may be final." Southeastern Promotions, Ltd. v. Conrad, supra at 561 (emphasis added); Freedman v. Maryland, supra at 58. That result is unconstitutional, because a censorship system "cannot be administered in a manner which would lend an effect of finality to the censor's determination" Ibid.

Moreover, a legitimate final judicial determination on obscenity vel non can come only through an adversary proceeding in which the person whose First Amendment rights are involved has an opportunity to participate. Southeastern Promotions, Ltd. v. Conrad, supra at 559-560; A Quantity of Books v. Kansas, 378 U.S. 205 (1964). Although Section 1305 theoretically affords such an adversary proceeding, in fact, for the great majority of addressees, there is no such remedy. Yet, a fundamental requirement of due process is an opportunity to be heard. Armstrong v. Manzo, 380 U.S. 545, 552 (1965). This requirement is to insure that the court will acquire the information it should have in a manner fairly calculated to illuminate the issues for reasoned decision-making. But the opportunity to be heard must be granted at a "meaningful time and in a meaningful manner." Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (emphasis added); Goldberg v. Kelly, 397 U.S. 254, 267 (1970); see also Fuentes v. Shevin, 407 U.S. 67 (1972). "[T]he right to a meaningful opportunity to be heard within the limits of practicality must be protected against denial by particular laws that operate to

jeopardize it for particular individuals." Boddie v. Connecticut, supra at 379-80. "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly, supra at 268-269.

The statute here fails to meet these tests. Under Section 1305, the only opportunity to be heard for claimants all over the United States is at the port of entry, here in New York City. In this context, this is not a "meaningful" opportunity to be heard.

This principle was applied in two cases not even involving First Amendment rights. In Pedroza v. Sec'y of HEW, 382 F.Supp. 916, 919 (D.P.R. 1974), the court held that, for a person in Puerto Rico, an opportunity to be heard in Washington, D.C. was, "for all practical purposes, considered invalid by this court." In Jeffries v. Olesen, 121 F. Supp. 463 (S.D. Cal. 1954), the court held that requiring a person to go from California to Washington, D.C. to defend his property rights was a violation of due process. "The 'fair' hearing essential to meet minimum requirements of any accepted notion of due process includes not only rudimentary fairness in the conduct of the hearing when and where held, but also a reasonably fair opportunity to be present at the time and place fixed" Id. at 475.

Mr. Justice Black, dissenting in United States v. Thirty-Seven (37) Photographs, supra at 387, recognized these burdens of the Section 1305 procedures: "Faced with such lengthy legal proceedings

[up to 74 days] and the need to hire a lawyer far from home, [the importer] is likely to be coerced into giving up his First Amendment rights. Thus the whims of customs clerks or the congestion of their business will determine what Americans may read."

In this case, about 98% of the addressees defaulted, in effect waiving their statutory and constitutional right to be heard and to get a judicial determination. It cannot be assumed that all these people willingly waived their rights: "We do not presume acquiescence in the loss of fundamental rights." Ohio Bell Tel. Co. v. Public Utilities Comm., 301 U.S. 292, 307 (1937). As Justice Black recognized, the burdensome venue procedures under Section 1305 undoubtedly coerce many people into giving up their property and their First Amendment rights.

Not only do the existing Section 1305 procedures impair First Amendment rights by depriving claimants of a realistic opportunity for an independent judicial determination on obscenity vel non, those procedures also impair First Amendment rights by deterring private individuals from seeking to import arguably protected materials. Faced with the prospect that customs officials will seize such materials and institute a forfeiture proceeding which is inordinately impractical and expensive to defend, such importers will be dissuaded from even ordering materials which might well be protected, rather than risking losing their money or having to engage in an expensive defense of their property and rights.

Ironically, importers of marginal, though presumably protected, materials, especially for their own use, are precisely the ones who most need the protections of the First Amendment and its procedural safeguards. The Supreme Court has condemned the situation where such self-censorship results from procedural devices which can be " . . . applied in settings where they have the collateral effect of inhibiting the freedom of expression by making the individual the more reluctant to exercise it. . . .[W]here we conceived that [a procedural device] was being applied in a manner tending to cause even a self-imposed restriction of free expression, we struck down its application. *Speiser v. Randall*, 357 U.S. 513." *Smith v. California*, 361 U.S. 147, 157 (1959).

That the existing Section 1305 procedures are burdensome is virtually self-evident. Their unconstitutionality is reinforced by the availability of "less drastic means" for the government to achieve its objective of excluding obscenity. Permitting claimants from all over the United States to defend their property and their First Amendment rights only in the Southern District of New York is demonstrably not the narrowest, least drastic means available for the government to achieve that objective. The modified procedures required by Judge Frankel demonstrate this. Under the existing procedures, after the United States Attorney at a port of entry institutes a Section 1305 forfeiture proceeding, he sends each addressee a notice and form claim and answer. Under Judge

Frankel's modified procedures, the United States Attorney would simultaneously also inform the addressee that, if he chooses to, he can have the forfeiture proceeding transferred to the district of his residence or of the destination of the mail matter.^{10/}

These procedures are workable "less drastic means"; they effectively accommodate the interests of both the claimant and the government.

The claimant's opportunity to defend his property and First Amendment rights will no longer be all but illusory. If he chooses to have the proceedings transferred, he can then have a meaningful opportunity to examine the seized materials and decide whether to contest the forfeiture. If he decides to do so, he can "marshal the facts," Wolff v. McDonnell, 418 U.S. 539, 564 (1974), and appear for trial to present evidence and make arguments. He may even be able to obtain local counsel, on a retained or pro bono basis. Thus, by a simple transfer, the claimant gains a meaningful opportunity to defend his constitutional rights.^{11/}

^{10/} The claimant contends that the United States Attorney should also clearly spell out to each addressee that the forfeiture proceeding was instituted on the basis of a mere administrative finding of probable obscenity; that, by simply returning the form claim and answer, he can get an independent judicial determination on obscenity vel non; and, that he has a right to appear and demand a jury trial. Such notice will assure that potential claimants are aware of their rights. This is especially important because potential claimants rarely can or will hire a lawyer to defend a few magazines, or an abstract principle such as free expression.

^{11/} The claimant agrees with Judge Frankel that, because the modified procedure would adequately protect his rights, not all Section 1305 forfeiture proceedings must automatically be referred to recip-

When such "less drastic means" are available, administrative inconvenience will not justify continued use of onerous procedures. See Freedman v. Maryland, supra; United States v. Thirty-Seven (37) Photographs, supra. In any event, under the modified procedures here, the administrative inconvenience would be minimal. Only a claimant who seriously expects that his seized materials might not be considered obscene by his local community standards, and who is not reticent about publicly defending in his home community his right to receive sexually-oriented materials will request a transfer. But at least he will have had the opportunity to defend. The administrative burden caused by those who do request transfer will be de minimus. Like many other aspects of the existing Section 1305 procedures, a simple, routine procedure can be set up to forward the proceeding to the appropriate district; it would only require an additional form.^{12/}

Footnote 11 Cont'd

plaint districts for judicial action. Only those claimants who contest the forfeiture and request a venue change will get a transfer. The district court at the port of entry may properly dispose of the materials subject to uncontested seizures, which, we suspect, will be the result in most cases.

^{12/} Under existing procedures, the government has refined the process to a mechanical routine, with forms for each stage of the proceeding: certificate of custody (A.6), complaint (A.4-6), verification (A. 65), affidavit of mailing (A. 66), notice (A. 67-68), claim and answer (A. 69-70), warrant for arrest--obscene articles (A. 71-72), newspaper notice and affidavit of publication (A. 75), notice to claimant (A. 107-108), affidavit in support of partial default judgment (A. 116-118), partial default judgment (A. 111-113, and certificate of entry of partial default (A. 119).

At the other end of the transfer, there would be no need for any additional administrative or judicial bureaucracy. The district courts and the United States Attorneys are already in place. Like the ports of entry, the recipient district could set up routine administrative procedures to notify the claimant that the seized material arrived and when he may inspect it. A hearing will be scheduled only if, after inspection, the claimant requests one. Experience under the existing procedures suggests that most claimants will waive a jury. As under the existing procedures, the court probably could consolidate proceedings if there were more than one.

Finally, the government contends that the modified procedures would make it impossible to comply with the time requirements mandated by United States v. Thirty-Seven(37) Photographs, supra at 372. There are numerous flaws in that contention. First, the time limits probably could be met under the modified procedures. Those procedures would not affect at all the requirement that a forfeiture proceeding must be instituted within 14 days of seizure, and, by prompt transfer of contested cases, the requirement that a forfeiture proceeding must be completed within 60 days could probably be met. Second, in any event, the Supreme Court, in setting up those requirements, expressly said that any delays beyond the allowable time limits caused by the claimant would not invalidate the forfeiture. Id. at 373. Third, the Supreme Court established the

allowable time limits in light of past experience under the existing procedures, Id.; certainly a modification designed to enhance the procedural safeguards for the claimant's First Amendment rights would justify a reasonable extension of the time limits in such cases.

The existing procedures inflict an enormous and unconstitutional burden on First Amendment rights. The modified procedures which the District Court found to be constitutionally required are workable and less drastic methods to achieve the government's objectives and should be sustained.

III.

THE DISTRICT COURT PROPERLY HELD THAT
A SECTION 1305 CLAIMANT OF ALLEGEDLY
OBSCENE MATTER MUST HAVE AND MUST BE
TOLD OF A RIGHT TO TRANSFER A FORFEITURE
PROCEEDING TO THE DISTRICT OF HIS
RESIDENCE OR OF THE DESTINATION OF
THE MAIL MATTER.

The government argues here that the modified procedures endorsed by Judge Frankel contravene Section 1305 and 28 U.S.C. §1404(a), and that the venue provisions of those statutes are immune from attack because they are within Congress' virtually unfettered constitutional power to regulate foreign commerce and to limit the jurisdiction and venue of the lower federal courts. The claimant contends that Congress' powers are not so unfettered, that the statutes must yield to the dictates of the First Amendment, and that, to avoid constitutional doubts, the statutes may be

construed to allow the modified procedures.

A. Limitations on Congressional power.

Concededly, the Court has ruled that Congress has the power, under the foreign commerce clause of article I, to prohibit the importation of obscene materials and to establish procedures to seize and condemn such materials. United States v. Thirty Seven (37) Photographs, supra; United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973). Congress also has, under article III, the power to define the jurisdiction and venue of the lower federal courts. See Yakus v. United States, 321 U.S. 414 (1944). But, like all its powers, these powers are limited by the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press" See, e.g., United States v. Thirty-Seven (37) Photographs, supra; see also Milwaukee Publishing Co. v. Burleson, 255 U.S. 407, 430-31 (1921) (Brandeis dissenting).^{13/} Not only may Congress not substantively abridge First Amendment rights, but it may not authorize or establish procedures which unduly impair those rights. Manual Enterprises, Inc. v. Day, supra at 497.

Thus, Congress may not exercise its foreign commerce power

^{13/} "[Congress'] postal power, like all its other powers, is subject to the limitations of the Bill of Rights. . . . Congress may not through its postal power put limitations upon the freedom of the press which directly attempted would be unconstitutional." Id.

through procedures that unduly burden First Amendment rights. In United States v. Thirty-Seven (37) Photographs, supra, the Supreme Court held that, to comply with First Amendment requirements, Section 1305 procedures must have strict time limits. Similarly, in Lamont v. Postmaster, supra, the Court held that procedures set up under Congress' postal power imposed an undue burden on First Amendment rights.

The contours of the limits on Congress' article III power over the jurisdiction and venue of the lower federal courts are less well defined.

Many, though not all, commentators agree that Congress theoretically could abolish the lower federal courts altogether. See discussion in Redish and Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev. 45 (Nov. 1976). That potentiality, it is sometimes argued, proves that Congress has unfettered control over the jurisdiction and venue of any such courts it chooses to set up. This is plainly not so. Even if, arguendo, Congress has the power to abolish the lower federal courts, if Congress chooses to set up and maintain such courts, it must exercise its power consistent with other provisions of the Constitution. There are constitutional limitations on Congress' power over jurisdiction and venue.

In addition to the specific limitations on this congressional

power, discussed below, there are inherent, general limitations. Most commentators agree that there must be limitations to protect constitutional rights, see Redish and Woods, supra, and that Congress cannot limit jurisdiction and venue in a way that effectively nullifies constitutional rights.

The Second Circuit has expressly recognized such limitations. In Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948), the court recognized that the right to an independent judicial resolution of constitutional questions, enunciated in Crowell v. Benson, 285 U.S. 22 (1932), limits Congress' power "to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court." Id. at 237. Congress cannot exercise its article III power in a manner that would "deprive any person of life, liberty, or property without due process of law...." Id. See also Boyd v. Clark, 287 F. Supp. 561 (S.D.N.Y. 1968) (three-judge court), aff'd on other grounds, 393 U.S. 316 (1969); Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969). 14/

14/

"The initial assumption that must be made to support [the proposition that Fifth Amendment due process requires an independent resolution of constitutional claims] is the rather obvious one that neither the executive nor Congress has authority to violate constitutional rights. From this premise, the next step is the conclusion that if constitutional rights are to retain any protection from attack by the majoritarian branches of government, those branches cannot themselves be the final arbiters of the meaning and scope of constitutional protections." Redish and Woods, supra at 78.

(FN Continued on Next Page)

Footnote 14 Continued

The government in support of its position quotes a short excerpt from Professor Hart's "Dialogue". (Brief at 24-25) But that quotation must be considered in the context of the whole discussion. A few pages after that quotation is the following discussion:

Q. Let's stop beating around the bush and get to the central question. The bald truth is, isn't it, that the power to regulate jurisdiction is actually a power to regulate rights--rights to judicial process, whatever those are, and substantive rights generally? Why, that must be so. What can a court do if Congress says it has no jurisdiction, or only a restricted jurisdiction? It's helpless-helpless even to consider the validity of the limitation, let alone to do anything about it if it's invalid.

A. Why, what monstrous illogic! To build up a mere power to regulate jurisdiction into a power to affect rights having nothing to do with jurisdiction! And into a power to do it in contradiction to all the other terms of the very document which confers the power to regulate jurisdiction!

Q. Will you please explain what's wrong with the logic?

A. What's wrong, for one thing, is that it violates a necessary postulate of constitutional government--that a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained.

* * * * *

Q. Have you got the patience to spell out just what my fallacies are?

A. There are so many of them it will take a little time.

Let's start with the most obvious one. Your point, at best, can apply only to plaintiffs. Perhaps a plaintiff

Here, the existing Section 1305 procedures effectively nullify the constitutional rights of claimants by allowing a prior restraint by government officials on free expression to become a permanent restraint, without a realistic opportunity for an independent judicial resolution of the constitutional questions. Congress should not be able, through its power over the venue of the lower federal courts, to set up unduly onerous venue provisions which

Footnote 14 Continued

does have to take what Congress gives him or doesn't give him, although I have my doubts about it. But surely not a defendant. It's only a limitation on what a court can do once it has jurisdiction, not a denial of jurisdiction, that can hurt a defendant. And if the court thinks the limitation invalid, it's always in a position to say so, and either to ignore it or let the defendant go free. Crowell v. Benson and the Yakus case make that clear, don't they?

Q. You're saying, then, that the power to regulate jurisdiction is subject in part to the other provisions of the Constitution?

A. No. It's subject in whole not in part. My point is simply that the difficulty involved in asserting any judicial control in the face of a total denial of jurisdiction doesn't exist if Congress gives jurisdiction but puts strings on it.

Hart and Wechsler, The Federal Courts and the Federal System, pp. 336-337 (2d ed. 1973).

have the effect of allowing administrative officials to make determinations of what is protected expression without an independent judicial determination on that constitutional question.

Even more important than these general considerations are specific limitations on Congress' venue power. Congress cannot, for example, require a constitutional court to render an advisory opinion, Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436 (1792), nor dictate the judgment to be rendered by it, United States v. Klein, 13 Wall. 128, 20 L.Ed. 519 (1871); Moore's Federal Practice, p. 612, ¶0.60[6].

More appropriately, Congress could not provide that all federal bank robbery prosecutions must be tried in New York City, regardless of where in the United States the crime was committed; article III, section 2 and the Sixth Amendment provide that all crimes must be tried in the state or district in which the crime was committed. Congress could not provide that all civil actions filed by black people must be filed and tried in Alabama; that would violate the equal protection clause. Congress could not provide that only federal courts in Washington, D.C. have jurisdiction to grant a jury trial in federal criminal prosecutions; that would violate the Seventh Amendment right to a jury trial. Congress might not be able to provide that a criminal trial cannot be transferred to the defendant's home district; that may constitute a denial of due process. United States v. Noland, 495 F.2d 529 (5th Cir. 1974).

Like the above, the claimant contends, Congress cannot provide that all Section 1305 forfeiture proceedings must be prosecuted in the port-of-entry district; that violates the First Amendment rights of claimants in two ways: by improperly precluding use of the proper local community standard, and by imposing unduly onerous procedural burdens on free expression. The First Amendment limitations on all of Congress' powers could hardly be clearer: "Congress shall make no law [substantive or procedural] . . . abridging the freedom of speech." (emphasis added) Surely, the Congress could not provide that the validity of all obscenity seizures must be litigated in Fargo, North Dakota. Yet, the statute, as presently enforced, accomplishes an equivalent result.

The government's reliance on Hipolite Co. v. United States, 220 U.S. 45, 58 (1911), is misplaced. The issue there was whether Congress had exceeded its constitutional grant of power over interstate commerce, not, as here, whether Congress' exercise of its constitutional power infringed on an express constitutional limitation on its power, such as the First Amendment; the Bill of Rights was not involved in that case.

The government's reliance on cases dealing with the power of Congress to fix venue in criminal cases is also misplaced. In those cases, Congress defined certain crimes as "continuing" offenses, which could be committed in more than one jurisdiction. The courts simply held that when such a crime has been committed in more than one district, prosecution of the defendant is proper in

either district because the Sixth Amendment allows prosecution in any district where the crime was committed. See, e.g., Armour Packing Co. v. United States, 209 U.S. 56 (1908).

None of the government's criminal venue cases involve prior restraints on free expression, such as those under Section 1305. In Reed Enterprises v. Clark, 278 F.Supp. 372 (D.D.C. 1967) (three-judge court), aff'd mem., 390 U.S. 457, the court held that a commercial distributor of allegedly obscene material could be prosecuted under 18 U.S.C. §1461 in the district into which the materials were mailed, as well as the district from which they were mailed. The court observed that such a venue provision would not significantly add to the burdens on free expression already inherent in the threat and institution of criminal prosecution. In discussing the breadth of Congress' power to establish venue, the court inferred that that power may be limited by the special need for safeguards on prior restraints on expression: " . . . we are not confronted with any direct 'prior restraint' upon free speech or any procedure restraining dissemination of materials prior to a judicial determination of their constitutional status. The application of the venue statute obviously occurs only after dissemination." Id. at 381 (emphasis added).

This discussion shows that Congress cannot, in the exercise of any of its constitutional powers, infringe First Amendment rights. The pivotal question here, therefore, is whether Section 1305 procedures, authorized by Congress, infringe the First Amendment

rights of claimants. As shown earlier in this brief, the existing Section 1305 procedures are unconstitutional on two independent First Amendment grounds: (1) under the Miller local community standards test, the procedures deprive claimants and their local communities of the freedom to read and see things in accordance with their own standards of what is or is not obscene, and (2) under the First Amendment procedural safeguards requirements, they fail to afford a less onerous and expensive procedure for the vindication of claims to items seized. Both of these flaws can be remedied by providing a claimant the right to transfer a forfeiture proceeding to his home district. As we will now show, the federal statutes relied on by the government can be construed to accommodate such a procedure.

B. Statutory construction

Statutes should be construed to avoid constitutional doubts. United States v. Harriss, 347 U.S. 612, 618 (1954). "When the validity of an Act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Crowell v. Benson, 285 U.S. 22, 62 (1932). Accord, United States v. Thirty-Seven (37) Photographs, supra at 369; United States v. 12 200-Ft. Reels, supra at 130 n.7.^{15/}

^{15/} Compare Blount v. Rizzi, supra. In Blount, salvation of the federal statute would have required "its complete rewriting in a manner inconsistent with the expressed intentions of some of its authors." (emphasis added). Thirty-Seven Photos, supra at 369.

In United States v. Thirty-Seven (37) Photographs, all of the Justices agreed that, without strict time limitations on instituting and completing Section 1305 forfeiture proceedings, Section 1305 would be unconstitutional for having inadequate procedural safeguards. Although the statute is stone silent on timing, the Court, to avoid the constitutional problem, read into the statute the requirement that Section 1305 proceedings must be instituted within 14 days of seizure and must be completed within 60 days of the institution of proceedings. Id. at 369. Similarly, the claimant contends here that, in light of the constitutional problems described above, Section 1305 may be construed to permit and require that a claimant be entitled to a venue transfer to his home district. Also, to the extent that 28 U.S.C. §1404(a) may be considered an obstacle, it may be similarly construed.

1. Section 1305

The government properly points out that Section 1305 provides that a forfeiture proceeding must be instituted in the district in which the materials were seized by customs officials. But the statute does not say that the proceeding must be completed there. A venue transfer is consistent with the statutory language.

This kind of statutory gloss to avoid constitutional problems is familiar. In United States v. Thirty-Seven (37) Photographs, supra, the Supreme Court read into Section 1305 very specific time limits which were not even suggested by the statute. In Oestereich

v. Selective Service System Local Board No. 11, 393 U.S. 233 (1968), the Court ignored both the language and legislative history of a statute which said: "No judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution" The Court reviewed and overturned a ministry student's classification as I-A because it violated a statutory exemption for ministry students. The Court rejected a literal reading of the judicial review prohibition because that would be "to construe the Act with unnecessary harshness." Id. at 238.

Courts are especially reluctant to construe a statute in a way which creates burdensome venue requirements. See United States v. Johnson, 323 U.S. 273 (1944); United States v. Ross, 205 F.2d 619 (10th Cir. 1953); Venue: Impact on Obscenity, 11 So. D. L. Rev. 363, 368-69 (Spr. 1966).

In United States v. Johnson, a person was prosecuted for using the mails to send dentures in violation of the Federal Denture Act, 18 U.S.C. §420; the prosecution was instituted in the recipient district. The Act contained no venue provisions. The Supreme Court held that in the absence of clear congressional intent,^{16/} prosecution could only be held in the sending district. The Court's language is instructive to our Section 1305 case, especially

^{16/} In 1948, Congress clearly expressed its intention to allow prosecutions in more than one district. 18 U.S.C. § 3237.

considering that the result there was reached in a case which did not even involve special First Amendment rights:

But if the enactment reasonably permits the trial of the sender of the outlawed dentures to be confined to the district of sending, and that of the importer to the district into which they are brought, such construction should be placed upon the Act.

Plainly enough, such leeway [to prosecute in one of several districts] not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what might be deemed a tribunal favorable to the prosecution.

Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.

While it might facilitate the Government's prosecution in a case like this to have its witnesses near the place of trial, there must be balanced against the inconvenience of transporting the Government's witnesses to trial at the place of the sender the serious hardship of defending prosecutions in places remote from home (including the accused's difficulties, financial or otherwise . . . of marshalling his witnesses), as well as the temptation to abuses, already referred to, in the administration of criminal justice. Inasmuch as the statute permits and does not forbid this construction, the judgment below must be affirmed.

United States v. Johnson, supra at 275-278. (emphases added)

In 1953, the Tenth Circuit, in United States v. Ross, supra, displayed a similar distaste for a statutory construction which would create burdensome venue requirements. At that time, 18 U.S.C. § 1461 provided criminal penalties for one who "deposits

for mailing" obscene materials. Strictly construing the statute, the court held that that phrase did not fall within the ambit of the general criminal venue statute, 18 U.S.C. §3237, which provides that a person who makes illegal "use of the mails" can be prosecuted in the sending, receiving, or intervening districts. The court found that the only proper venue was in the district of the sender, where the mail had been "deposited for delivery"; Congress had not clearly expressed an intention to permit more onerous venues under Section 1461.^{17/}

Here, Congress has not expressed a clear intention to prohibit

^{17/} In 1958, Congress amended Section 1461 to proscribe "use of the mails" for obscene materials, thereby authorizing multiple venues through the general venue statute. The constitutionality of the multi-venue provisions under Section 1461, as amended, was upheld in Reed Enterprises v. Clark, supra.

The Reed Enterprises holding, however, is limited to Section 1461; it has no applicability to Section 1305. First, as noted earlier, the court specifically relied on the fact that Section 1461 involved a post-activity prosecution, not a prior restraint (like Section 1305). That is a crucial difference; as the Supreme Court said in Southeastern Promotions, Ltd. v. Conrad, supra at 558-59: "The presumption against prior restraints is heavier--and the degree of protection broader--than that against limits on expression imposed by criminal penalties." Second, the court reached its decision only after a long analysis of the legislative history of Section 1461 established that Congress had unequivocally expressed its intention to permit the more burdensome venues. Third, the court relied on its finding that the multi-venue provisions did not significantly add to the burdens on free expression inherent in a criminal prosecution under Section 1461.

Venue considerations under Section 1461 are substantially different from those under Section 1305 for yet another reason. Under Section 1461, generally two districts have a significant relation-

Footnote 17 Cont'd

ship to the offensive conduct--the sending district (where the person unlawfully using the mails generally resides) and the receiving district (the community most affected by the obscene materials). The main reason for the 1958 amendment to Section 1461 was to permit prosecution in the district most affected by the offensive conduct--the recipient district.

Under Section 1305, the community in which the person improperly using the mails resides (the importer) and the community affected by the obscene materials (the recipient community) is the same community; the "sending" community, for all practical purposes, is the one from which the allegedly obscene materials were ordered for importation from abroad. The coincidence of these interests in the same community makes it the sensible place for venue.

a venue change under Section 1305. In fact, when that section was enacted in 1930, Congress did not even discuss the issue. The paragraph that established the procedures for forfeiture proceedings was hastily drafted by Senator Walsh during floor debate to overcome objections about allowing "inferior administrative officers" (customs clerks) to make determinations of obscenity without judicial review.^{18/} 72 Cong. Rec. 5421-29 (1930).

In light of the constitutional problems with the existing Section 1305 procedures and the absence of clear congressional intent to limit venue to the ports of entry, Section 1305 should be construed to permit venue transfers to recipient districts.

2. 28 U.S.C. § 1404(a).

This section provides that a district court may, for the convenience of parties and witnesses, transfer any civil action to any other district where it might have been brought. The government contends here that, under Section 1404(a), a Section 1305 proceeding may not be transferred to another district because, as an action in rem, it could not have been brought in any other

^{18/} The legislators would probably be dismayed to discover that the judicial review that they were so concerned about assuring is, in practice, largely illusory.

It should be noted that Section 1305 was drafted long before the Supreme Court enunciated the community standards rule, Miller v. California, supra, or the constitutional necessity for procedural safeguards to protect free expression, especially when prior restraints are involved, Freedman v. Maryland, supra; United States v. Thirty-Seven (37) Photographs, supra.

district.

We submit that, regardless of what Section 1404(a) provides, transfer of Section 1305 proceedings must be permitted to meet the constitutional requirements discussed earlier. However, Section 1404(a) may present no problem at all. If Section 1305 is construed to permit and require a choice of venue, then Section 1404(a) is inapplicable. Section 1404(a) is simply a general grant of authority to district courts to transfer a case to a more convenient forum. Where a substantive statute, such as Section 1305, is construed to contain an independent grant of authority to transfer a particular kind of case, Section 1404(a) becomes irrelevant.

If Section 1404 is held to be applicable, it would have a serious constitutional infirmity here. Rather than a broad declaration of unconstitutionality, however, Section 1404(a) can be held facially constitutional but unconstitutional as applied to the narrow category of civil actions under Section 1305, which have unavoidable First Amendment ramifications. Section 1404(a)'s proper and laudable applicability to all other civil actions would be unimpaired by the creation of such a narrow, constitutionally-mandated limitation.

The claimant also contends that there is some basis for construing Section 1404(a) to permit a transfer. We acknowledge that several cases have held that an in rem action cannot be transferred under Section 1404(a) because there is no district in which the action could have been brought except the one in which it was

brought. But none of the cases cited by the government (Brief at 17-18) involved First Amendment rights; they all involved property rights. In light of the constitutional problems, Section 1404(a) must be given any feasible construction which would allow a transfer.

A hypertechnical application of Section 1404(a) to Section 1305 proceedings would be contrary to the general purposes of Section 1404(a) and would not further the limited purpose of the limitation clause "where it could have been brought."

The general purpose of Section 1404(a) is "to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice." Van Dusen v. Barrack, 376 U.S. 612, 615 (1964). However, to protect a plaintiff from the burden of having a defendant choose a new forum, Congress limited transfer to districts in which the action could have been brought. Hart and Wechsler, The Federal Courts and the Federal System, p. 1135 (2d ed. 1973). Although some courts have construed this limitation to prevent transfer of an in rem action, the object of that limitation is advanced very little by applying it to an in rem action brought by the government against highly portable objects like magazines and leaflets. Since the government has United States Attorneys in all districts, the government would not be significantly disadvantaged by the transfer, assuming the transfer was, as required by the statute, to a more convenient forum.

The Supreme Court has shown reluctance to apply Section 1404(a) too literally to in rem actions. In Continental Grain Co. v. Barge FBL-585, 364 U.S. 19 (1960), the Court held that an action could be transferred even though it could not have been brought in the transferee district in its existing form as partly an in rem action.

In Construction Aggregates Corporation v. S.S. Azalea City, 399 F.Supp. 662 (D.N.J. 1975), the court held that where it was in the interest of justice to transfer an in rem action against a ship, the only questions were whether the transferee court had jurisdiction and whether transfer would prejudice the plaintiff. The court found that the transferee court would have in rem jurisdiction because the defendant was willing to admit such jurisdiction and had given the plaintiff a letter of undertaking as a substitute for the ship itself. The court also found that the plaintiff would not be prejudiced by the transfer. The court said: "It is thus clear from the foregoing [discussion of the Continental Grain Co. case] that the technical distinction of an in rem action will not bar the transfer of a case when the interests of justice dictate such transfer." Id. at 664.

In Torres v. Steamship Rosario, 125 F.Supp. 496 (S.D.N.Y. 1954), the court ordered transfer of an in rem action against a ship: "As long as a decree in rem can be entered by the court to which transfer is sought, the difference in the nature of an in rem proceeding does not prevent giving full effect to the policy of the statute. . . . In the present case the ship could have been

arrested as easily in [the transferee district] as in this district. Since it was not it can be made subject to the jurisdiction of the [transferee district] by the filing of a bond or stipulation there." Id. at 497.

Here, the government could have "arrested" the seized materials in the recipient district. In any event, the materials are easily transportable and the claimant is willing to stipulate to the transferee court's jurisdiction to grant an in rem judgment against the materials.

Finally, we would note that the kinds of venue considerations which we are advancing here are similar in purpose to those underlying 28 U.S.C. §1391(e). In that provision, Congress has permitted citizens to challenge official action in the district where the citizen resides. The result for which we contend here would achieve the same purpose within the unique context of a Section 1305 obscenity proceeding.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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February 18, 1977

ADDENDUM

Map showing the number of addressees in each
State who had materials seized in Schedule 1303





UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellant,

v.

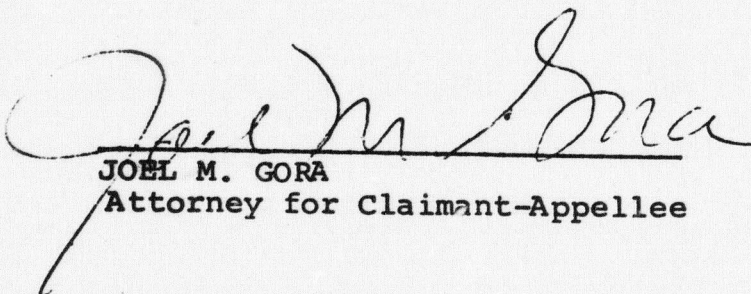
VARIOUS ARTICLES OF OBSCENE MERCHANDISE,
SCHEDULE NO. 1303,

Defendant-Appellee.

No. 76-6152

CERTIFICATE OF SERVICE

I, Joel M. Gora, hereby certify that service of the Claimant-Appellee's Brief has been made upon the Plaintiff-appellant by hand-delivering two copies thereof, this 18th day of February, 1977 to Frederick P. Schaffer, Assistant United States Attorney, One St. Andrew's Plaza, New York, New York 10007.


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